Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

ORIGINAL

In the matter of

REEXAMINATION OF THE POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS

ORIG FILE

92-52

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TO: THE COMMISSION

REPLY COMMENTS
MICHAEL J. WILHELM

Michael J. Wilhelm pursuant to Section 1.405 of the Commission's rules, hereby files his reply comments in the captioned matter and in support thereof, states:

I. INTRODUCTION

1. These reply comments represent the views of the undersigned, an attorney who practices before the Commission. They do not necessarily represent the views of his clients.

II. POSTURE OF THE PROCEEDING

2. With all due deference to the mandate of the Court of Appeals in the *Bechtel* case[1/], it would seem that the instant Notice of Proposed Rulemaking is, at most, a beginning. A policy that has been in place for 27 years cannot adequately be reformed in three months and one round of comments and reply comments. The Notice of Proposed Rulemaking, contrary to its caption, did not propose new rules, but rather spoke in generalities about policy changes. The NPRM thus reads more like a Notice of Inquiry and for the foregoing reasons should be treated as such. *Accord*, *FCBA Comments* at 6.

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[1/] *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992).

III. COMMENTS OF OTHERS

3. Many who filed comments endorsed the "service continuity" discussed at paragraph 28 of the NPRM. *See, e.g. Comments of Black Citizens for a Fair Media, et al.* at 2-5. Some relief is indeed needed from a system that has spent years in determining which applicant should prevail on the standards enunciated in the *Policy Statement on Comparative Hearings*, 1 FCC 2d 393, 396 (1965); only to have the station go to the highest bidder soon thereafter.

4. The Commission has defined this "service continuity" concept only in the sense of a credit for the applicant promising to retain ownership for a 3 year period. The concept should be much broader than that; and the holding-period, longer: at least 5 years. During that time licensees should be held to performance of every promise contained in their applications — including programming promises.

A. Programming

5. For good reason, the Commission is reluctant to engage itself in decisions respecting program content. *See* NPRM at 17. The constitutional factors that foreclose program-content regulation, however, are not present when the Commission speaks to the amount of programming offered. Behind the rationale for using amount of proposed programming as a comparative factor is the conclusion that — all other things being equal — a station broadcasting a regular schedule of news and public affairs programming is to be preferred over a station that receives 99.99% of its programming from a satellite music service and makes a gesture to the public interest by airing a "canned" public affairs program at six o'clock on Sunday morning. Thus, it is suggested that applicants be permitted to request credit for the amount of news and public affairs programming proposed, and that the

credit be determined by the time of day programs are broadcast as well as the overall time devoted to such broadcasts.

C. Local Residence

6. The local residence credit has not made a good deal of sense for many years; particularly, after the Commission began allocating Class A FM channels to large communities. The credit rests on the untested hypotheses: (a) that knowledge of the community automatically osmoses into residents thereof, and (b) that one is knowledgeable of the community when he or she lives 5 feet within the theoretical service contour, but loses that knowledge if he or she resides 5 feet outside that contour. The same may be said of 2 applicants, one who lives 5 feet inside the city limits and one who resides 5 feet without.

7. The local residence credit has outlived whatever utility it may once have had; the "knowledge by osmosis" theory is faulty on its face. However, the correlative credit for civic activity indulges the defensible presumption that one working to improve the community has greater knowledge thereof. The Commission has held that civic participation is part and parcel of local residence[2/], thus creating the situation in which an applicant who has not lifted a finger to help his or her community — but, by accident of geography, lives there — is always to be preferred to the individual who may live in a "bedroom community" in the surrounding area, but works and performs civic activities in the community of license. *Cf. FCBA Comments* at 8.

8. The local residence credit should be abolished and the efforts for which civic activity credit is given should be narrowed. Thus, for example, no credit should be given for mere membership in a local organization or church, and applicants should be prepared to

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[2/] *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 947 (1985)

state how they became better informed about the community by virtue of their civic activities.[3] NAACP & LULAC suggest that civic credit be given for civic activities, wherever performed, but do not favor us with an explanation of how civic activities in Tuscaloosa give one a better knowledge of what is going on in Tallahassee. *Comments of NAACP & LULAC* at 2.

B. Integration of Ownership and Management.

9. The central difficulty with integration credit is the conclusive presumption that owner-managers will provide the best practicable service to the public. *See* NPRM at ¶ 14. None of the comments reviewed addresses this question with any "hard" data; nor could such data realistically be gathered in time for inclusion in comments and replies hereto.[4] The best that can be said, on this record, is that we do not now know what, if any, benefit flows from integration of ownership and management. It would appear that the *Bechtel* court's problem with the matter would be answered by making the presumption, *supra*, a freely rebuttable one. Thereafter, the case law and study of the experience of operating stations would lead to a far better basis for determination of the validity of the integration credit. NAB's proffered presumption that "group operated stations are better able to serve the public," is merely a conclusive presumption of opposite polarity and, therefore, should not be considered. *NAB Comments* at 7, emphasis in original.

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[3] It is further suggested that this question of familiarity with the community should be put to test in cross-examination at hearing.

[4] NAACP and LULAC advert to a study in progress. If the study is timely and competently prepared, it should be made the subject of a further notice of proposed rulemaking.

D. Efficient Use of the Frequency

10. Today, any knowledgeable applicant will specify a transmitter location that will reach unserved and underserved areas (of which few are left), thereby to obtain a coverage preference in the comparative calculus. As soon as the construction permit is issued, that applicant likely will abandon that site in favor of one that gives him or her coverage parity with existing stations in the densely populated areas of the market. The only fine-tuning necessary to make a coverage preference justifiable is to require the applicant to maintain service to unserved or underserved areas after the station goes on the air and for a reasonable number of years thereafter.

E. Finder's Preference

11. Anyone with the telephone number of a consulting engineer and three-hundred or so dollars to spend, may "find" an FM channel. *See e.g. NAACP & LULAC Comments* at 23. Why this should result in a preference is not immediately obvious: it seems nothing more than a means of further cluttering the spectrum by potential applicants who will "drop in" channels across the country in search of the preference. The proposed credit is indeed analogous to the Commission's finder's preference for new technologies — NPRM at ¶ 29 — but it is not identical. There is no inherent public benefit here; no new technology will result and the "found" channel will likely be indistinguishable from the standpoint of public benefit. The preference would neither lessen delay nor conserve the Commission's resources. One can readily envision a rulemaking in which Channel X is requested for Community Y, only to be met by counterproposals to assign the channel to every wide spot in the road for a 50 mile radius, thereby to gain the finder's preference. *But see, Fuss Petition for Rulemaking*, RM-7741 (May 6, 1991) at 3.

F. Auxiliary Power

12. About the only thing that can be said about auxiliary power credit is that it does no harm and just might do some marginal good in the event of natural or man-made disaster.

G. Diversification

13. The concept of wide dissemination of conflicting viewpoints that underlies the diversification credit has become essentially meaningless except for that brief period early Sunday morning when the typical station meets its public interest "obligations." Whatever benefit may remain is of too little weight for diversification to be the preeminent factor in licensing procedures. It thus is problematic whether an individual owning a radio station in Provo, Utah and applying for a station in Key West, Florida is, thereby, going to confine the free expression of ideas in either of those markets. It would seem adequate, then, to restrict consideration of same-market ownership of media to such media located within, say, 100 miles from the center of the market, and to reduce diversification to a level equivalent to, for example, broadcast experience.

IV. ACCOUNTABILITY

14. The exercise of divining the optimum applicant from the entrails of applications and promises in direct cases has proven less than optimally effective for the simple reason that the applicant can make those promises with his fingers crossed behind his back: the Commission will never check. Accountability is the only thing that is going to provide relief from disingenuous proposals. It is proposed that accountability be built in to the "service continuity" concept, *supra*. Thus, a rule might read as follows:

> For the 5 years following issuance of Program Test Authority, each individual or company awarded a construction permit — whether as a "singleton" applicant or through a comparative hearing or settlement — shall file with the Commission a biannual report detailing the manner in which the promises made in its application are being fulfilled. Any permittee or licensee which has not made substantial compliance with its promises shall be restricted from selling the station for more than the ordinary and usual expenses incurred in the preparation and prosecution of the application, and in construction and operation of the station. The length of such extended prohibition shall depend on the seriousness of the offense. Any applicant filing false information shall be subject to forfeiture or fine and/or revocation of license or construction permit.

The sanction for not fulfilling promises is a fair one to the extent that the very worst penalty puts the permittee or licensee in the *status quo ante* by permitting him or her to either sell the station and recoup his or her expenses, or continue to operate it with the sole restriction that it cannot be sold at a profit for the length of the extended "service continuity" period. *But see, Capital Cities/ABC Comments* at 13.

15. The Commission has a Field Operations Bureau that checks to ascertain whether stations have fulfilled the promises made in their applications, *e.g.* on-frequency operation, specific power and directional characteristics, tower location, painting, lighting, marking, etc. The penalty for non-compliance is payment of a forfeiture — of late, a substantial forfeiture given the Commission's new forfeiture authority. This checking on technical compliance is evidence that checking on employment, programming, etc. promises would not be unduly burdensome.

V. POINT SYSTEM

16. Ranking comparative characteristics in terms of "1, 2, 3, 4" instead of "slight, moderate, substantial and strong," NPRM at ¶ 8, brings no additional accuracy to the evaluative process. Under the current system, applicant evaluation is in part, subjective and should remain so. The job of an Administrative Law Judge is just that — to form a defensi-

ble judgment; not to add up columns of figures and issue the construction permit to the applicant with the highest score. The "demeanor" of witnesses, for example, is a critical factor in judging an integration proposal. It is far simpler — and closer to the facts — for a judge to say that the demeanor of witness "A" indicated less credibility than that of witness "B;" than to say that "A" loses to "B" because "A" scored 6-7/8 on the credibility scale and "B" scored 7-2/3. Similarly, judges are often required to balance, say, civic activities. The determination of whether "A" who belonged to the Moose Club for 10 years was more civic-minded than "B" who served as a hospital volunteer, is not readily made by application of "points." *See AWRT Comments* at 7.

VI. LOTTERIES AND TIE BREAKERS

17. Administrative Law Judges have had authority to resolve hearing deadlocks by lot. The undersigned cannot recall an instance in which this was done; there cannot have been more than a handful in any event. If the Commission thinks a lottery meets its public interest mandate, it might as well save the trouble and just post a "to whom it may concern" construction permit on a tree in front of 1919 M Street and conclude that if the permit is gone in the morning, the public interest has been served.

VII. SHAMS, SCAMS AND OTHER ABUSES

18. Experience with lotteries in cellular, SMRS, MDS, etc. has shown the tendency of the application process to reach equilibrium when changes are made. Thus, when the Commission — in the name of "efficiency" — abandoned cellular comparative hearings in favor of a lottery, the number of applicants increased from about 8 per market to 800 per market or above. The only other noticeable change was in the fraud rate: the number of persons

attempting to skew the lottery process in their favor by being undisclosed real parties in interest, filing applications in the name of the family dog, etc.

19. It is virtually certain that the fraud rate would increase in broadcast proceedings as soon as any "simplified" number-counting criteria were implemented. Essentially, the Commission then would be taking each application at face value — an approach that would place construction permits in the hands of the likes of the notorious "Sonrise" applicants or the fictitious "Dr. Boozer."

20. There always is a look of disbelief when one attempts to explain to a novice in the business that the broadcast application process is the analog of a civil trial. As strange as that process may be, it does have the singular advantage that the basic and comparative qualifications of each applicant are examined under a microscope by teams of hungry and skeptical lawyers. There is no evidence that this scrutiny is not working or that some other process is intuitively superior. Thus, it is respectfully submitted that — as noted above — certain reforms and efficiencies in the comparative analysis process are necessary. However, abandonment of judging in favor of "bean counting," is abdication of responsibility; not reform.

Respectfully submitted,

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June 22, 1992

Certificate of Service

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